BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARC WILSON	)	
Claimant	)	
V.	)	
	)	
WHITLEY CONSTRUCTION	)	
Respondent	)	Docket No. 1,071,298
AND	)	
	)	
QBE INSURANCE CORPORATION	)	
Insurance Carrier	)	

ORDER

Claimant, through Jan Fisher, of Topeka, requests review of Administrative Law Judge Rebecca Sanders' January 29, 2015 preliminary hearing Order. Daniel J. Lobdell, of Kansas City, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the January 28, 2015 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

This case concerns claimant's asserted September 11, 2014 low back injury by repetitive trauma. The judge denied benefits after finding claimant failed to prove he provided timely notice.

Claimant appeals the finding regarding notice. Claimant argues his date of injury by repetitive trauma was September 11, 2014, and he provided timely notice.

Respondent maintains the Order should be affirmed. Respondent argues claimant did not provide timely notice of a September 11, 2014 injury by repetitive trauma. Respondent also argues notice was untimely because the proper date of injury by repetitive trauma should be May 20, 2013, which is when claimant's primary care physician suggested he rest and avoid strenuous use or painful motions.

The issues are:

1. What is claimant's date of injury by repetitive trauma?

2. Did claimant prove timely notice of his asserted injury by repetitive trauma?

FINDINGS OF FACT

Claimant began working as a carpenter for respondent in September 2008. He did a "lot of sheetrocking"[1] on pre-framed walls, which was 80% of his job. He worked with ⅝" thick, 4' x 8' or 4' x 10' sheets that weighed over 50 pounds each. He moved sheetrock from a stack onto a dolly, took the sheetrock where it needed to be, unloaded it on the floor and screwed the sheetrock to walls. He testified his job required him to bend over "pretty much the whole day"[2] to lift the sheetrock and to screw it into walls. Claimant also lifted sheetrock over his head to screw it on to ceilings. He further did some insulation and wall framing, which involved placement of bottom and top tracks and studs.

Claimant testified that in 2014, his work increased his pain. He testified that his leg pain gradually came on in 2014 and became more severe, including pain in his right calf.

Claimant had a preexisting back condition, which he characterized as a right leg problem from a herniated lumbar disc. He had right leg pain, numbness and tingling. Harold A. Hess, M.D., reviewed a lumbar MRI that showed a right L5-S1 disc herniation and a broad-based L4-5 disc bulge. Dr. Hess operated on claimant's low back, specifically performing a right L5-S1 hemilaminotomy and discectomy on March 11, 2008.[3] Claimant had a June 18, 2008 MRI that showed no focal disc herniation at L4-5 and minimal generalized disc bulge at L5-S1. By June 20, 2008, claimant reported marked improvement, with pain ranging from a 1 to a 2 on a 0-10 pain scale.

Claimant went to his primary care physician, Van T. Tran, D.O., on August 31, 2011. Claimant's complaints involved low back pain and intermittent right leg pain. Dr. Tran "added, continued or refilled" claimant's Flexeril, Hydrocodone and Lidoderm prescriptions.

Claimant returned to Dr. Tran on January 10, 2012. He complained about worsening, intermittent low back pain radiating into his left leg. Dr. Tran assessed claimant with back pain with radiation. Dr. Tran ordered a lumbar MRI, which was done on January 19, 2012. A doctor interpreted the MRI as showing a left paracentral disc extrusion at L3-4 and postoperative changes at L4-5 without recurrent disc extrusion, but with minimal fibrosis around the right L5 nerve root.

Claimant saw Dr. Tran on January 24, 2012, again complaining of low back pain radiating into his left leg. Claimant's assessment remained the same. Dr. Tran suggested claimant continue taking Percocet.

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[1] P.H. Trans. at 8.

[2] *Id.* at 11.

[3] Dr. Hess noted claimant also had a transitional S1-2 vertebrae. Such transitional vertebrae may have resulted in different doctors identifying claimant's vertebrae differently.

Claimant saw Charles M. Striebinger, M.D., on January 31, 2012, for left leg pain which developed after he bent over to lift something. Claimant acknowledged struggling off and on with some back pain and occasional right leg pain after his 2008 surgery. Dr. Striebinger reviewed the January 19, 2012 MRI and concluded claimant had postoperative changes at L5-S1, but such level could be considered L4-5 depending on how claimant's vertebrae are counted because he had a transitional vertebrae. He diagnosed claimant with a left-sided L4-5 herniation and recommended conservative treatment.

Scott E. Ashcraft, M.D., performed an epidural steroid injection at L3-4 on February 2, 2012. Brian G. Mills, M.D., performed a second epidural steroid injection on March 8, 2012. Dr. Mills also prescribed gabapentin. Dr. Mills noted claimant's symptoms were exacerbated by lifting or moving at work.

Claimant returned to Dr. Tran on October 15, 2012. He reported having gone to the emergency room on October 13 for back pain. Claimant had low back pain radiating into his left leg. He had left leg weakness greater than right leg weakness. Straight leg raise testing produced pain when raising either leg. Sitting and walking aggravated claimant's back pain. Dr. Tran injected claimant with Toradol. For back pain with radiation, Dr. Tran suggested a referral to pain management.

Dr. Tran evaluated claimant on May 20, 2013, for back pain that radiated into both legs and the left thigh. Claimant reported daily activities and walking aggravated his symptoms. Dr. Tran injected claimant with Toradol and prescribed gabapentin. Dr. Tran suggested claimant rest and avoid strenuous use or painful motions. Claimant testified he understood Dr. Tran's instructions to mean "[q]uit working,"[4] but there was no way for him to avoid his strenuous work activities. Claimant did not tell anyone at respondent that his work was bothering him.

A June 3, 2013 MRI was interpreted as showing a smaller L3-4 extrusion as compared to prior films, a stable disc bulge at L4-5 and no disc bulge at L5-S1.

Claimant fell on the ice, striking his buttocks, on March 4, 2014.[5] He went to an emergency room on March 8 and had an injection. He saw Dr. Tran on March 11 for low back pain radiating into his right leg, sharp right calf pain and numbness. Dr. Tran ordered a lumbar MRI. Claimant testified his right leg pain was present before his fall on the ice.

Claimant had a lumbar MRI on March 18. A doctor interpreted it as showing mild right-sided disc bulging at L4-5 with the possibility of a small recurrent disc herniation and no evidence of L5-S1 disc disease, but congenital moderate central canal narrowing.

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[4] P.H. Trans. at 33.

[5] Unless noted otherwise, all time references from this point forward concern 2014.

As a result of his fall on the ice, claimant was seen by an unknown doctor at the Shawnee Mission Medical Center (SMMC) pain management center on March 27. Claimant complained of right-sided low back pain that "travels into the deep part of his right buttock[,] skips his posterior thigh[,] but starts back up just below his knee and down the back of his calf, stopping at his ankle." Claimant described his pain as constant, gnawing, grinding and unrelenting for several years. The doctor diagnosed claimant with post-lumbar laminectomy syndrome, lumbar radiculopathy and lumbar disc displacement at L4-5. Suggestions included an epidural steroid injection (ESI), use of Elavil and perhaps a transforaminal injection and/or physical therapy.

Claimant testified after his fall on the ice, he had a shot and everything was fine. Claimant also had pain from shoveling snow, but his pain decreased with medication. The medical records show claimant had more than one injection. Dr. Ashcraft gave claimant an ESI at L5-S1 on April 1. Dr. Tran also injected claimant with Toradol on May 12 for back pain with radiation into his right leg.

Dr. Ashcraft noted on May 15 that claimant had two ESIs without significant long-term improvement. The doctor suggested a transforaminal injection. On May 28, a nurse practitioner in Dr. Tran's office agreed with Dr. Ashcraft's suggestion. Claimant had Dr. Ashcraft perform the L5 transforaminal injection on June 5. By June 20, claimant reported being pleased with the results of the injection. Dr. Ashcraft performed a repeat transforaminal injection on July 2.

A nurse practitioner in Dr. Tran's office saw claimant on August 6. Claimant reported low back pain radiating to the right calf. His symptoms were aggravated by bending, lifting and twisting. Claimant reported being in physical therapy. The nurse practitioner assessed lumbar radiculopathy and suggested continued physical therapy.

Claimant returned to Dr. Tran on August 29. Claimant reported his back pain began three days earlier. He had pain, numbness, tingling and weakness in his right leg. His pain was aggravated by any activity. Dr. Tran assessed claimant with back pain with radiation. Dr. Tran suggested claimant have a lumbar MRI. She refilled claimant's Oxycodone.

Claimant testified his last day of employment was September 11. That day, claimant bent over to pick up a piece of sheetrock. He testified he thought "something's wrong"[6] because he could not lift the sheetrock due to leg pain. He had the same right calf pain as before, but also some right toe numbness and pain. Claimant testified he "didn't know what was going on."[7]

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[6] P.H. Trans. at 20.

[7] *Id.* at 20.

Claimant testified the same day he could not lift the sheetrock, he spoke to his foreman, Tom Garrity. He testified he said, "Tom, I'm in pain. I can't take it no more. Something is going on."[8] Claimant did not explain to Mr. Garrity that he was in pain because of his work, but he thought Mr. Garrity "knew why [he] was in pain."[9] According to claimant, Mr. Garrity told him to work through it. Claimant testified he told Mr. Garrity's son, Nick, "[L]ook, man, I'm ready to leave, I can't make it." Nick told him he could make it and claimant continued working.

Claimant returned home and he "hit the floor."[10] He testified he called Kenneth Clawson, respondent's vice-president of operations, and told him, "[S]omething's wrong. And he is like, well, what do you want to do? I can lay you off or I can put you on workman's comp."[11] Claimant did not know if Mr. Clawson asked him if something happened at work, but testified they discussed workers compensation because he told Mr. Clawson "something had happened at work."[12] He further testified he told Mr. Clawson "something happened at work and I don't know what. And I told him, I says, I don't know what's going on."[13] Claimant agreed he told Mr. Clawson he did not know what happened. Claimant further testified Mr. Clawson told him to go to his doctor and find out what was wrong. Claimant testified September 2014 was the first time he told anyone at respondent that his "repetitive work [for respondent] had caused [his] back problems."[14]

Mr. Clawson's recollection of the phone call from claimant was:

> A. He called me, I believe it was morning but I don't remember the time of day, and told me he had woke up and his left leg, I think, was killing him. Like needles or pins or something. And I said, well, did you do something at work? And he goes, I don't know what I've done. I don't remember doing anything at work. And then that's when I told him, I said, Marc, you need to go find out what's wrong first here and let's see what it is. And that's the first call.
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> Q. So as far as you can recall, did you specifically ask him whether what he was experiencing happened at work?

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[8] *Id.* at 36.

[9] *Id.* at 36-37.

[10] *Id.* at 22.

[11] *Id.* at 22.

[12] *Id.* at 22.

[13] *Id.* at 37.

[14] *Id.* at 34.

> A. Yeah, I said, did you do something at work yesterday? Because he was on a job. It's a federal job and it's got a very strict safety program. And any injuries no matter how small, if it's an injury or a - - we got a name for it, incident - - it has to be reported. And that's why I asked him if anything had been talked about at the job. And he said, I don't remember doing anything that triggered it. So that's when I told him to go ahead and let's find out, you know, did you have health insurance. And that's what he had stated earlier. And he could go and find out what was going on.[15]

Mr. Clawson denied that telling claimant to find out what was wrong with his back was an authorization for treatment under workers compensation insurance.

Claimant had a lumbar MRI scan the morning of September 12. The MRI was interpreted as showing a suspected disc herniation at L4-5. Just after his MRI, claimant was evaluated by Dr. Tran. Claimant complained of low back pain radiating into his right leg , which was aggravated by walking, lying down and prolonged sitting. He was limping and had right leg weakness. Claimant reported more pain in his right calf. He noted he was driving a lot for work. Dr. Tran assessed claimant with back pain with radiation and leg pain.[16] Claimant's right leg was bad enough for Dr. Tran to order a Doppler scan to explore if claimant had a deep venous thrombosis, but such test was negative. Dr. Tran injected claimant's back with Toradol, prescribed Prednisone, refilled claimant's Hydrocodone prescription and told claimant he could use the Lidoderm patch as well.

Dr. Tran told claimant he could not work. Claimant testified he thereafter told Mr. Clawson he needed to "turn it in to workman's comp," but Mr. Clawson told him "workman's comp is off the table."[17] Mr. Clawson recalled the conversation as follows:

> [S]ince it didn't happen at work and it wasn't related to work, it wasn't work comp. And that's when he called me on - - I think he called me after the treatment. And he said, I got a shot and I think - - he had something. And he said, I think I can go on Monday. Then he called me on Sunday night or Sunday day and said, I'm in unbearable pain and I can't go to work on Monday. And he said, is there anything you can do for me? And I said, no, I can't, since you didn't get hurt at work. It's not work-related. I don't know what to do with that. So in my mind, not knowing the history of all this other stuff, that the accident didn't happen at work and so that, unfortunately, I wouldn't be able to do anything with that. And so that was my answer then.[18]

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[15] *Id.* at 41-42.

[16] Dr. Tran's assessment states left leg pain, but all other references concern the right leg.

[17] P.H. Trans. at 24.

[18] *Id.* at 42-43.

Claimant testified that after he and Mr. Clawson spoke on September 14 and Mr. Clawson told him workers compensation was "off the table," he sought advice from his union on Monday morning and hired his attorney.

Dr. Tran evaluated claimant on September 15. Claimant reported low back pain radiating into his right calf. His symptoms were aggravated by bending, sitting and walking. He was limping and had right leg numbness and weakness. Claimant reported going to the emergency room the previous day. Pain medication was not controlling his pain. Two male nurses had to help claimant off the examination table. Dr. Tran assessed claimant with back pain with radiation and prescribed Diluadid, Fentanyl and Lyrica.

Mr. Clawson testified he contacted respondent's insurance carrier about claimant's situation within a week of September 14:

> Q. All right. When was the first time that anybody from your company, you or anybody from your company contacted QBE?
>
> A. I don't know. Just because I never thought it was a work comp claim. So I don't - - I would have followed it up with a phone call to risk management once I knew that there was - - Marc was going through more, just to tell them I had the conversation with Marc and what I had going on.
>
> Q. And that discussion would have included that there was a discussion about whether this should be turned into work comp. Correct?
>
> A. Yeah. Not really work comp. It was just - - well, yeah, work comp. Turn it into insurance.
>
> Q. I mean, QBE only handles your work comp. Right? It doesn't handle your private insurance?
>
> A. Right.
>
> . . .
>
> Q. And that discussion about that you went to risk management, would that have occurred in that same week period of time? You know, if 9-11 was a Thursday and he would have called you maybe that Sunday after 9-11, would it have occurred sometime in that following week?
>
> A. Yeah. I would say within a week or two.
>
> Q. Okay. So probably within a week, do you think?
>
> A. I think. Yeah.

Q. Okay. So at that period of time, although it was somewhat nebulous as to exactly what occurred, there had been a discussion about whether this should be turned in as work comp. Correct?

A. Yeah. I didn't take it as turn it in as work comp. I took it as, did the accident happen on the job. And in my mind, the accident didn't happen on the job. I didn't really take it that it was about the insurance or anything.

Q. Well, let me ask you this, if somebody comes in and says, I had a car wreck off the job and I have hurt my back, would you turn that in to risk management?

A. No.

Q. You only turn in claims to risk management if there's some indication that it might be work-related?

A. I, again, it was, we turn in anything from a paper cut. That's what risk management is for.

Q. But it's only if it's a paper cut on the job. Right?

A. Yes.

Q. All right. So September 14th, the Sunday when you think you had that call with him, within a week of that you would have had some discussion with risk management about the possibility that this was work, that it was claimed as work comp.

A. Yeah. I would have told them, Marc knows something's wrong. He's a good employee. He is. He's a good person. He's a good worker. I would like to have the same Marc back.

Q. Okay.

A. But, yes. I would tell him - - you know, I don't think I called. And we have what we call - - I don't know if it's quarterly or monthly, I would have to look. But we cover anything that's going on in the company. And during that call, they might have said, hey, is there anything going on that you know about. And it could have come up then. I don't remember making the call. That's the reason I'm thinking that we were, we had this conversation just because of another schedule. And it come up and then I told them about what was going on with Marc.[19]

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[19] *Id.* at 44-47.

Claimant was admitted to SMMC on September 26. He complained of a six month history of low back pain and numbness in his right toes the past several days. The examining physician noted claimant could only passively raise his right leg about 20° off the bed, he had minimal right leg strength and decreased sensation in his right foot. The examining doctor noted claimant's September 2014 MRI showed a more prominent disc herniation at L4-5 than a March 2014 MRI. Consultation with neurosurgery was ordered, likely with Paul O'Boynick, M.D.

The consultation report stated claimant had a four month gradual onset of right leg pain and weakness that worsened over the prior month. Claimant denied significant back pain, but he reported right foot numbness. He reported working in construction and, three weeks earlier, fell to the floor upon arriving home because of leg pain and weakness. The report noted claimant's September 2014 MRI showed a large right-sided herniated disc at L4-5 that had increased in size as compared to a March 2014 MRI. The examining doctor recommended lumbar surgery.[20]

Dr. Striebinger operated on claimant on September 29, performing an L5-S1 laminectomy with removal of scar tissue. X-rays were taken twice to make sure the operation was at the correct level. Claimant was discharged from SMMC on October 2.

On December 18, Dr. Striebinger signed claimant's attorney's December 17 letter which stated:

> Under the Kansas Workers Compensation law, an injury is compensable only if the work accident or series of micro-traumas was the primary reason or "prevailing factor" in the medical condition, disability and need for treatment. Assuming no other substantial or intervening factors, it is your belief that Mr. Wilson's job duties of installing sheet rock over a long period of time - including during the summer/fall of 2014 - is the primary reason - or prevailing factor - in the development of the herniated disc at L5-S1. This herniation is a "structural change" from the finding of the MRI in March, 2014. The rationale for this opinion is as follows:
>
> 1. After disc surgery at only one (1) level, there is only a 10-15% chance of a second disc herniation absent additional trauma;
>
> 2. The low back pain and left leg pain for which you treated Mr. Wilson in 2012 was a different problem and was not related to the 2014 disc herniation at L5-S1; and
>
> 3. Jobs, such as installing sheet rock, done over a long period of time would substantially increase the risk of low back and disc problems.

[20] This report is unsigned and the last page of the report is not in evidence.

If this is a correct summary of our conversation and your opinion regarding causation, please sign this letter where indicated below and fax it to me at 785-233-0430.

Alternatively, if there are any corrections or additions which you feel are appropriate, feel free to handwrite them in.

The preliminary hearing Order stated in part:

On September 11, 2014, Claimant bent over and was unable to lift the sheetrock. Claimant's right leg wouldn't let Claimant lift. The right leg pain was centered into his calf with numbness. Claimant got home and was unable to move.

On September 11, 2014 Claimant talked to Mr. Clawson, who is the production manager for the field staff. Claimant told him, he couldn't move, that he didn't know what happened. Claimant told Mr. Clawson that it had happened at work. He advised Claimant to go to his own doctor to find out what was going on.

Claimant went to his primary care doctor, Dr. Tran who told him not to work and ordered another MRI.

Claimant told Mr. Clawson about the MRI. He told Claimant that workers compensation was not covering Claimant's injury.

Claimant filed an application for hearing on September 24, 2014, with the Kansas Division of Workers Compensation Insurance.

Employer received notice on September 29, 2014 by way of the filing of the application for hearing.

Claimant has not returned to work for Respondent. Respondent contends that since Claimant's last day of work was September 11, 2014 then Claimant didn't provide timely notice. Since Claimant no longer works for Respondent, he only has ten days to give notice in accordance with K.S.A. 44-520(a)(1)(c).

. . .

The Court has reviewed the provisions of K.S.A. (201[3] Supp.) 44-520. It could be argued that Claimant on September 11, 2014 didn't know that this would be his last day of work. Claimant believed he would get treatment for his back and return to work. However, as of September 11, 2014 to the present day, September 11, 2014 was Claimant's last day of work. The provisions of K.S.A. 44-520(a)(1)(c) say Claimant has ten days after his last day of work to give notice. Claimant's last day of work was September 11 and 10 calendar days from that date is September 21, 2014. Therefore, Claimant did not give timely notice.

Thereafter, claimant filed a timely appeal concerning notice.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by repetitive trauma arising out of and in the course of employment.[21] The burden of proof is on the claimant. To determine if claimant satisfied his or her burden of proof, the trier of fact shall consider the whole record.[22]

K.S.A. 2013 Supp. 44-508 provides, in pertinent part:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
>
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
>
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
>
> In no case shall the date of accident be later than the last date worked.

K.S.A. 2013 Supp. 44-520 states:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

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[21] K.S.A. 2013 Supp. 44-501b(b).

[22] K.S.A. 2013 Supp. 44-501b(c).

> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
>
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.
>
> . . .
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
>
> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Board review of a judge's order is de novo on the record.[23] Appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the factfinder.[24] The Board often opts to give some deference – although not statutorily mandated – to a judge's findings and conclusions concerning credibility where the judge was able to observe the testimony in person.[25]

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[23] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[24] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[25] It is "better practice" for the Board to provide reasons for disagreeing with a judge's credibility determinations. *Rausch v. Sears Roebuck & Co.*, 46 Kan. App. 2d 338, 342, 263 P.3d 194 (2011), *rev. denied* 293 Kan. 1107 (2012).

ANALYSIS

Claimant's date of injury by repetitive trauma is his last day of actual work for respondent, which was September 11, 2014. Claimant's date of injury by repetitive trauma is not May 20, 2013. For K.S.A. 2013 Supp. 44-508(e)(2) to apply, there needs to be "diagnosed repetitive trauma." Dr. Tran did not diagnose claimant with repetitive trauma on May 20, 2013.

Claimant testified he told his supervisor, Mr. Garrity, on his last day worked that he was in pain and he could not take "it" anymore and Mr. Garrity told him to work through "it." Claimant did not tell Mr. Garrity that his work caused his injury. Claimant assumed Mr. Garrity knew why he was in pain.

Claimant called Mr. Clawson the evening of September 11. Claimant contends he told Mr. Clawson that "something happened at work and I don't know what." He also testified the subject of workers compensation came up because he told Mr. Clawson "something happened at work." Mr. Clawson testified he asked claimant if something happened at work and claimant said he did not know what he did and did not remember doing anything at work or doing anything to trigger his injury.

Claimant and Mr. Clawson spoke on September 14. Claimant contends he asked Mr. Clawson to turn his injury in as workers compensation, but Mr. Clawson said that option was off the table. Mr. Clawson testified claimant asked if respondent could do anything for him and he told claimant nothing could be done because it was not a work-related injury. Claimant then went to his union for help the next day and hired an attorney.

Mr. Clawson testified he spoke to respondent's insurance carrier within one week of September 14. Such discussion included whether to turn claimant's injury in as workers compensation or at least the possibility claimant was claiming workers compensation.

Notice under K.S.A. 2013 Supp. 44-520(a)(4) requires specifics, including the particulars of an injury. This Board Member questions if such particulars were provided if claimant did not tell Mr. Garrity why he was hurting or he told Mr. Clawson "something happened" at work, but he did not know what happened.

Both parties assert witness credibility needs to be explored to sort out the conflicting evidence regarding what claimant discussed with Mr. Clawson on September 11 and September 14. Claimant argues the actions of the parties following the discussions he had with Mr. Clawson show notice was provided. Respondent argues the judge's ruling against claimant regarding notice shows she found Mr. Clawson's testimony credible over that of claimant. This Board Member notes that while the judge ruled against claimant regarding notice, she did not make a specific credibility determination.

According to claimant, after Mr. Clawson told him on September 11 that workers compensation was not an option, he discussed his predicament with his union the next morning and hired an attorney, which he says is consistent with having a work injury. Claimant further asserts Mr. Clawson's discussion of the matter with respondent's insurance carrier within one week after September 14 is consistent with respondent knowing a work injury occurred. Respondent states Mr. Clawson's mention of claimant's injury to risk management was "irrelevant, and does not relieve Claimant of his obligation to provide adequate notice of a work related injury in accordance with K.S.A. 44-520(a)(4)."[26]

According to Mr. Clawson, he would only communicate with respondent's insurance carrier, QBE, about workers compensation injuries and not about unrelated injuries, such as an injury caused by an off-the-job motor vehicle accident. Mr. Clawson testified that within one week after speaking with claimant on September 14, he and QBE discussed whether "this" (presumably claimant's injury) should be "turned into" workers compensation insurance, his conversation with claimant, what was "going on" and the possibility claimant was alleging a work injury. Claimant argues, "Mr. Clawson certainly understood that Mr. Wilson was claiming workers compensation benefits. If not, Mr. Clawson would not have discussed the matter with risk management."[27] This Board Member agrees. It makes little sense for Mr. Clawson to communicate with QBE regarding something that was not a workers compensation injury.

Based on the current evidence, this Board Member concludes respondent had actual knowledge claimant was injured at work. Thus, under K.S.A. 2013 Supp. 44-520(b) the notice requirements in K.S.A. 2013 Supp. 44-520(a) are waived. Whether claimant sufficiently provided particulars of how he was injured is moot.

CONCLUSION

Having carefully considered the current record and considering the parties' arguments, the undersigned Board Member concludes respondent had actual knowledge of claimant's asserted injury by repetitive trauma, making unnecessary the K.S.A. 2013 Supp. 44-520(a) notice requirements.

WHEREFORE, the undersigned Board Member reverses the January 29, 2015 preliminary hearing Order.[28] The matter is remanded for further resolution.

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[26] Respondent's Brief at 6.

[27] Claimant's Brief at 16.

[28] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

IT IS SO ORDERED.

Dated this _____ day of March, 2015.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: Jan Fisher
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Honorable Rebecca Sanders